
No. 3550.

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

E. E. YOUNG,

Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHAR-
MACY ET AL.,

Defendants in Error.

UPON WRIT OF ERROR TO THE SOUTHERN DIVISION OF THE UNITED
STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF
CALIFORNIA, SECOND DIVISION

**BRIEF FOR DEFENDANTS IN ERROR,
CALIFORNIA STATE BOARD
OF PHARMACY ET AL.**

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FILED

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E. E. YOUNG,

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CALIFORNIA STATE BOARD OF PHARMACY, E. T. OFF, G. M. SUTHERLAND, J. G. McKOWN, H. J. FINGER, E. J. MOLONY, H. O. BUKER, J. S. O'CALLAGHAN, H. M. MEADER and RAYMOND G. LINDLEY, individually and as members constituting the said California State Board of Pharmacy,

Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR, CALIFORNIA STATE BOARD OF PHARMACY, AND E. T. OFF, G. M. SUTHERLAND, J. G. McKOWN, H. J. FINGER, E. J. MOLONY, H. O. BUKER, J. S. O'CALLAGHAN, H. M. MEADER AND RAYMOND G. LINDSAY, AS MEMBERS CONSTITUTING SAID CALIFORNIA STATE BOARD OF PHARMACY.

This is a writ of error to the Southern Division of the United States District Court of the Northern District of California, Second Division, to review a

judgment entered therein upon an order thereof denying plaintiff's motion for leave to file a second amended complaint.

STATEMENT OF THE CASE.

The original complaint in this action was filed in the District Court on June 24, 1919, and therein the plaintiff sought to recover from the defendants damages because of the alleged conversion of certain morphine, cocaine and opium alleged to have been owned by the plaintiff and his predecessors in interest. This complaint is set forth on pages 1 to 12 inclusive of the supplemental transcript of record filed in this court. In that complaint there were made defendants the California State Board of Pharmacy and the members of that board individually and as members constituting said board. The right of recovery was therein predicated upon a seizure of said goods on the sixteenth day of April, 1915, in the county of Imperial, State of California, by the defendants claiming to act under the Poison Act of the State of California, it being alleged by the plaintiff that said seizure was unlawful in that said goods were, so it was alleged, at the time of such seizure in transit in interstate and foreign commerce. The citizenship of the plaintiff did not appear in the body of the complaint, but in the verification to the complaint made by the attorney it was stated (Supp. Trans. p. 12) that "*the plaintiff resides in the city*

of Calexico, county of Imperial, State of California.”

In that complaint damages for such alleged conversion were sought against the board as such and against the members of the board as individuals and as members of said board.

The complaint having been served upon the secretary of the board, a demurrer and, by leave of court, an amended demurrer were interposed to the complaint by the defendant board and by the persons sued as members of said board. A demurrer and amended demurrer were also interposed by the defendant E. T. Off individually, he being the only member of the board served with the complaint. These demurrers are set forth on pages 13 to 18, inclusive, of the supplemental transcript of record. The amended demurrer of the board and of those sued as members set up as grounds of demurrer (1) want of jurisdiction in said court, (2) want of legal capacity of the plaintiff to sue, (3) that the complaint did not state facts sufficient to constitute a cause of action, (4) that the complaint was uncertain in that it could not be ascertained therefrom under what law, if any, of the United States the controversy arose or in what manner the controversy involved the construction of any law of the United States, and (5) that the alleged cause of action was barred by the provisions of section 338, subdivision 3 of the Code of Civil Procedure of the State of California.

Upon submission of the amended demurrer, the District Court sustained the same (Supp. Trans.

p. 18) rendering an oral opinion (Supp. Trans. pp. 19 to 25), from which it appears that it did so upon the ground that the cause of action was barred by the statute of limitations, but denied the claims of said defendants upon the point of jurisdiction.

Thereafter on January 10, 1920, plaintiff filed an amended complaint (Trans. pp. 1 to 7). It will be noted therefrom that plaintiff *omitted from said amended complaint all reference to the seizure of said property or the date thereof*, and in lieu thereof alleged in paragraph IV of said complaint that a portion of said property was *in transitu* in interstate and foreign commerce on or about the first day of May, 1919, and in paragraph V of said complaint alleged that other portions of said property were *in transitu* in interstate and foreign commerce on or about the first day of May, 1919. It was then alleged that said defendants had in their possession on or about the first day of May, 1919, all of the property hereinbefore mentioned and that on or about the first day of May, 1919, the plaintiff made demand upon said defendants for certain of said property, being some of the property alleged in paragraph IV and some of that alleged in paragraph V, but that the defendants had refused to deliver the same. It was then alleged in paragraph VII that on or about the tenth day of June, 1919, the plaintiff demanded of said defendants certain property which was the balance of the property described in paragraphs IV and V. *It was not alleged in the complaint that the*

property was at the time that demand was so made in interstate or foreign commerce. In the body of the amended complaint there was no allegation as to the citizenship of the plaintiff, but in the verification thereto made by the attorney (Trans. p. 6) it was stated that "plaintiff is a citizen of the State of Arizona and resides in said State of Arizona." It did not, however, appear either in the body of the amended complaint or in the verification thereto that he was a citizen of the State of Arizona at the time of the filing of the original complaint.

To this amended complaint said defendant board and members thereof interposed a demurrer assigning as grounds of demurrer (1) want of jurisdiction of the persons of said defendants, (2) want of jurisdiction of the subject of the action, (3) want of legal capacity to sue in the plaintiff, (4) that the amended complaint did not state facts sufficient to constitute a cause of action, (5) that the amended complaint was uncertain in not showing how defendants came into possession of the goods therein mentioned or whether their possession was tortious, and (6) that two causes of action in conversion were not separately stated in said amended complaint. In addition thereto said defendants assigned six other points of uncertainty with respect to said amended complaint designated respectively in paragraphs VII to XII, inclusive, of said demurrer, two points of ambiguity designated respectively in paragraphs XIII and XIV thereof

and one point of unintelligibility designated in paragraph XV thereof.

The court sustained said demurrer on March 1, 1920 (Trans. p. 17), rendering an oral opinion (Trans. pp. 18 to 19) in which it expressed the view that there being no diversity of citizenship jurisdiction could lie in that court only if a federal question was involved and that no federal question was shown upon the face of the amended complaint in that there was no averment that the goods were in interstate or foreign transit at the time of the alleged conversion; and in addition stated that in its opinion the complaint failed to state a cause of action in that the action was one in trover to recover damages for conversion of the property, and though it was alleged that a demand was made upon defendants while the goods were in their possession, there was no allegation that at the time of such demand they were illegally in their possession.

Thereafter plaintiff moved said court for leave to file a second amended complaint, accompanying said motion with the proposed second amended complaint in question. A copy of said proposed second amended complaint is set forth on pages 21 to 27, inclusive, of the printed transcript of record. The proposed second amended complaint made the same parties defendants and alleged (Trans. p. 22) that "the above named plaintiff is a citizen of the State of Arizona," and that "the above named defendants are, and each one is, a citizen of the State of Cali-

fornia.” For a first cause of action it alleged ownership in the plaintiff on or about the first day of May, 1919, of 115 ounces of morphine sulphate, possession by the defendants of said property on or about said date, demand by plaintiff on or about said date upon said defendants for said property and refusal to deliver same. For a second cause of action it alleged ownership by plaintiff on or about June 10, 1919, of certain other property described therein, possession by defendants of said property on or about said date, demand upon said defendants on or about said date for said property and refusal to deliver the same. The whole concluded with a prayer for judgment against the defendants and each of them for the value of the property, for compensation for pursuit thereof, for punitive damages and for costs. The proposed second amended complaint made no reference to such property being in interstate or foreign commerce and in no way alleged any federal question or jurisdiction in said court otherwise than by the allegation with respect to diversity of citizenship, this being the first time that jurisdiction was laid in that court upon the latter ground. Nor did the complaint in any way allege any facts showing that at the time of such demand the goods were unlawfully in the possession of said defendant.

Upon the hearing of said motion the defendants in opposition thereto, filed an affidavit of Louis Zeh as Secretary of the California State Board of Pharmacy, which affidavit will be found on pages 27 to 32

of the printed transcript of record. Briefly, the affidavit set forth that the property in question, the subject matter of the action and referred to in the proposed second amended complaint, had been seized and taken possession of by an inspector of the State Board of Pharmacy on the sixteenth day of April, 1915; a prosecution of the plaintiff and another in the month of April, 1915, for having such property in their possession contrary to law; the commencement on November 8, 1915, of an action in the District Court of the United States for the Southern District of California, seeking a writ of injunction restraining such prosecution and restraining the destruction of the property in question and the making of an order by the Hon. William C. Van Fleet, as Judge of said District Court, on the ninth day of November, 1915, directing said defendants to appear and show cause why an injunction *pendente lite* should not be issued and a decree by said court on December 6, 1915, dismissing said action; the filing on the twenty-seventh day of September, 1915, by said plaintiff and another in the District Court of the United States, in and for the Southern District of California, of a complaint in claim and delivery and for damages against said defendant, California State Board of Pharmacy, seeking to recover the same personal property and damages for the retention thereof, with an allegation therein that the plaintiff, E. E. Young, was a citizen and resident of the State of California; the sustaining of a demurrer to the second amended

complaint in said action without leave to amend and the dismissal of said action and judgment thereon entered in said court on September 28, 1916. Said affidavit also included a statement that the property described in the said complaint in injunction and in the second amended complaint in the action in claim and delivery, was the same property as that described in the original complaint in this action, in the amended complaint herein and in the said proposed second amended complaint, and that at no time since said property had been seized by said inspector had the plaintiff, or any other person acting for him, been in possession of said property or entitled to possession thereof, and in support of the matters alleged in said affidavit there was presented at the hearing of said motion certified copies of the records in the said action for injunction and in the said action for claim and delivery.

At said hearing, upon said motion for leave to file said proposed second amended complaint, said defendants also urged that said amended complaint would present the same points as to the want of jurisdiction in the District Court and as to the want of sufficient facts to constitute a cause of action as were presented upon the hearing with respect to the amended complaint; that in the proposed amended complaint plaintiff for the first time was seeking to invoke the jurisdiction of the District Court on the ground of diverse citizenship of the parties, and that it was not shown in the proposed amended complaint

that plaintiff was a citizen of Arizona at the time of the commencement of the action in the District Court, or that diverse citizenship of the parties existed when said action was commenced, as was required in order to confer jurisdiction upon the District Court on that ground.

Defendants further urged that the proposed amended complaint was in bad faith in that the alleged cause of action was barred by the statute of limitations; that the allegations in the proposed amended complaint setting forth a later date as the date of conversion obviously could not be taken as the true time of the conversion, as evidenced by the facts alleged in the original complaint and, as shown by the affidavit of Zeh which stood uncontroverted, by facts known to the plaintiff and to Judge Van Fleet who had passed upon the question of such seizure in the year 1915, thereby showing that the date in the original complaint was not inadvertently or erroneously stated therein by the plaintiff. It was also urged by the defendant board and members that the bad faith of the plaintiff was evidenced in the fact that whereas theretofore he had attempted to found the jurisdiction of the court upon the ground that a federal question was involved, namely interference with goods in interstate commerce, he had now abandoned that ground and was seeking to found the jurisdiction upon the ground of diverse citizenship; and that while the proposed amended complaint

alleged that the plaintiff "is" a citizen of Arizona, yet in the verification to the original complaint it had been stated that the plaintiff was then a resident of California, and that if he was then a resident of California he could not at the same time be a citizen of Arizona.

Upon the submission of said motion, said court on March 22, 1920, made its order denying said motion for leave to file said proposed second amended complaint. (Trans. p. 32.)

ARGUMENT.

It is submitted that in this case the only questions before this court are whether the court below erred in sustaining the respective demurrers or abused its discretion in denying leave to plaintiff to file his proposed second amended complaint. In reviewing this latter question this court should consider the history and progress of the case in the court below and the action of that court in view of the record before it. Furthermore, if it should appear to this court that nothing good can come of permitting the filing of such second amended complaint, this court should not set aside the action of the lower court notwithstanding that it does not agree with the reasons assigned for such action.

I.

**THE DISTRICT COURT DID NOT ERR IN SUSTAINING
THE AMENDED DEMURRER TO THE ORIGINAL
COMPLAINT.**

The cause of action in the original complaint was predicated upon a seizure alleged therein to have been made on April 16, 1915, and the action being commenced June 24, 1919, was barred by subdivision 3 of section 338 of the Code of Civil Procedure of the State of California.

Wood vs. Curry, 57 Cal. 208;
Harpending vs. Meyer, 55 Cal. 555;
Raynor vs. Mintzer, 72 Cal. 585;
Lattin vs. Gillette, 95 Cal. 317;
Horton vs. Jack (Cal.) 37 Pac. 652;

Angell on Limitations, Secs. 298 to 300.

The statute of limitations was sufficiently pleaded in the amended demurrer.

Nicholson vs. Tarpey, 124 Cal. 442, 449;
Williams vs. Bergin, 116 Cal. 56, 59;
Brennan vs. Ford, 46 Cal. 7;
Bank of San Luis Obispo vs. Wickersham, 99
Cal. 655, 659;
Fay vs. Costa, 2 Cal. App. 241.

II.

**THE DISTRICT COURT DID NOT ERR IN SUSTAINING
THE DEMURRER TO THE AMENDED COMPLAINT.**

The jurisdiction of the District Court not having been based upon any allegation of diverse citizenship,

but upon the ground that the suit was one arising under the constitution or laws of the United States, it was necessary that the federal question should have clearly and affirmatively appeared upon the face of the amended complaint.

Hanford vs. Davies, 163 U. S. 273;

Western Union Tel. Co. vs. Ann Arbor R. Co.,
178 U. S. 239.

The amended complaint showed no such question involved, for though it was alleged therein that the goods were at a certain time in transit in interstate and foreign commerce and that at a certain time they were in the possession of the defendants and also that at a certain time a demand had been made upon the defendants for said goods and defendants had refused to deliver the same, yet there was no connection shown between those allegations and no statement that the defendants had become possessed of the property while it was in such transit or had become possessed thereof at the time such demand was made. *There was therefore no federal question shown.* Furthermore the amended complaint did not state a cause of action for there was no allegation therein showing that the possession of the defendants was wrongful. In addition thereto the amended complaint sought to set forth two distinct causes of action for conversion but did not separately state the same as required by law. This was presented as a separate

ground of demurrer but was not passed upon by the court.

III.

THE DISTRICT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN DENYING LEAVE TO FILE THE PROPOSED SECOND AMENDED COMPLAINT.

In the proposed second amended complaint jurisdiction of the District Court was predicated solely upon the ground of diverse citizenship of the parties. But it was necessary that such diverse citizenship should have existed at the commencement of the action and be so alleged in the pleadings. The proposed second amended complaint alleged that "plaintiff is a citizen of the State of Arizona." This allegation was insufficient to confer jurisdiction—it did not show that he was a citizen of Arizona at the commencement of the action.

Robertson vs. Cease, 97 U. S. 646;
Anderson vs. Watt, 138 U. S. 694.

No cause of action was stated, for the plaintiff must show in an action in trover that at the time of conversion he had title, general or special, and the right of immediate possession, or he must show that he was in the actual possession of the property and was wrongfully deprived thereof by defendants.

38 Cyc. 2068, 2069, and cases cited.

This court will take judicial notice of the laws and statutes of California and of the so-called Poison Act of California.

Missouri etc. Ry. Co. vs. Wulf, 226 U. S. 570;
Lloyd vs. Matthews, 155 U. S. 222.

Under the Poison Act (Stats. 1907, page 124 as amended), the plaintiff had no right to the possession of the drugs involved in this case unless it affirmatively appears that he is a physician or druggist or comes within the specially designated exceptions in the Poison Act. The proposed amended complaint shows no such facts and therefore the plaintiff did not show right to possession of the goods.

The right to permit or reject an amended pleading is entirely discretionary with the trial court and its action therein will not be reviewed unless there is gross abuse of discretion.

The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, cannot be assigned as error in the Supreme Court.

Marine Insurance Co., vs. Hodgson, 6 Cranch, 206;
Spencer vs. Lapsley, 20 Howard, 264.

The granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below and not reviewable, except in a case of gross abuse of discretion.

~~Spencer~~
~~Gromley~~ ^{U.S.} vs. *Bunyan*, 138 ~~Cal.~~ 623;
Loeb vs. Eastman Kodak Co., 183 Fed. 704.

Where inconsistencies are shown in respective pleadings they may well lead a trial court to distrust the good faith of the plaintiffs and raise additional circumstances in support of the court's position and show no abuse of discretion in disallowing a further amendment.

Barclay vs. Hibernia Savings & Loan Society,
21 Cal. App. 456.

In a case where plaintiff had sought through several amendments to plead a good cause of action, and the trial court had, upon a fifth effort, denied the leave to amend further, the higher court said that the trial court in its discretion was fully justified in assuming that further efforts would likewise fail and in assuming that the fault of the pleading did not lie in the pleader but in the facts; that he had been allowed time enough and that it could not be said that the trial court abused its discretion in ending the matter.

Smith vs. Ferries & C. H. Ry. Co., 51 Pac. (Cal.)
710, 718.

In the present case the plaintiff in his proposed second amended complaint predicated his right to sue in the District Court upon the ground of diverse citizenship. Upon several occasions in his previous actions he had alleged himself to be a citizen of California, and in the verification to the original complaint in this action it was alleged that "plaintiff resides in" California. whereas in the proposed

second amended complaint it is alleged that “plaintiff is a citizen of the State of Arizona.”

Section 1 of article XIV of the Constitution of the United States declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

It having been stated in the verification to the original complaint that plaintiff was then a resident of California, the court might well have questioned the good faith of the plaintiff when in his proposed second amended complaint he alleged himself to be a citizen of Arizona. For although a person could be a resident of a state without being a citizen thereof, he cannot under the constitutional provision be a citizen of a state without being a resident thereof, and therefore if he was a resident of California at the commencement of the action, as stated in the verification to the original complaint, he could not at the same time be a citizen of Arizona.

IV.

THE DISTRICT COURT HAD NO JURISDICTION.

In addition to the foregoing, it is submitted on behalf of said defendants that it appears from said complaint that the District Court has not, nor has this court, jurisdiction of the subject matter of said action or of the persons of said defendants, and although the District Court overruled the defendant's objec-

tions on the matter of jurisdiction, this court should on that ground, irrespective of any others, deny the writ of error and order the action dismissed.

Any recovery had in this action against said defendant board, or against said defendants as members of said board, would be payable out of public funds under the control of said defendant board or defendant members thereof but owned by the State of California and to be used by said state in the exercise of governmental functions. Where such is the case, the suit is in effect a suit against the state and is one over which neither the District Court nor this court has any jurisdiction.

Smith vs. Reeves, 178 U. S. 436;

In re Ayers, 126 U. S. 443;

Lankford vs. Platte Iron Works, 235 U. S. 461;

Grand Trunk Western Ry. Co. vs. Curry, 162 Fed. 978.

If any conversion of plaintiff's goods was had, it was not because of action had by the board as such, but because of the action of individuals who were members of the board, and if any action lies it lies against such individuals alone. The state is not liable for the torts of its officers.

Melvin vs. State, 121 Cal. 16;

Chapman vs. State, 104 Cal. 690;

Denning vs. State, 123 Cal. 316;

County of Alameda vs. Chambers, 35 Cal. App. 537.

Before the state can be sued in any case in which suit is permitted under the laws of the state a claim must first be presented to the Board of Control.

Chapman vs. State, supra.

Furthermore the defendant board is not a citizen nor are the other defendants when sued in their representative capacity.

The court did not therefore obtain jurisdiction through the diverse citizenship of the parties.

It is respectfully submitted that the District Court did not err in sustaining the demurrers to the complaint and amended complaint or abuse its discretion in denying the motion for leave to file a second amended complaint and that the writ of error should be dismissed and the judgment of dismissal be allowed to stand.

Respectfully submitted.

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